Supreme Court, U.S.
FILED
NOV 16 2005
OFFICE OF THE CLERK

No. 05-658

IN THE

Supreme Court of the United States

In re NARINDER SINGH

ON PETITION FOR A WRIT OF MANDAMUS TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

KENNETH J. OWEN
Counsel of Record
6098 Slopeview Court
Castro Valley, CA 94552
(510) 583-0984

QUESTIONS PRESENTED

1. Whether the three-judge panel of the Court of Appeals for the Ninth Circuit usurped its judicial power when it independently ruled on Mr. Singh's asylum and withholding of deportation claims instead of remanding the case to the Board of Immigration Appeals under the authority of *INS v. Ventura.*

2. Whether the three-judge panel of the Court of Appeals for the Ninth Circuit usurped its judicial power when it acted as a rubber stamp in denying Mr. Singh's petition for review in utter disregard of Congress' expectation that it correct the Board of Immigration Appeal's factual decision where that body has made an egregious mistake.

PARTIES TO THE PROCEEDING

Petitioners are Narinder Singh, Mr. Singh's wife, Kulwant Kaur, and there two minor children, Sandeep Singh and Navneet Singh, citizens of India.

Respondent is the three-judge panel of the United States Court of Appeals for the Ninth Circuit that ruled on Mr. Singh's petition from a final order of the Board of Immigration Appeals: Andrew M. Kleinfeld, Ninth Circuit Judge, Fairbanks, Alaska; Michael Daly Hawkins, Ninth Circuit Judge, Phoenix, Arizona; and Susan P. Graber, Ninth Circuit Judge, Portland, Oregon.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Table of Appendices	vii
Opinions Below	1
Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	1
Reasons for allowance of the Writ	4
A. Mandamus Law	4
B. The three-judge panel usurped its judicial power when it independently adjudicated Mr. Singh's asylum claims	5
C. The three-judge panel merely rubber-stamped the BIA decision	10
Conclusion	16
Petitioners' Appendix	1a-23a

TABLE OF AUTHORITIES

Cases:	Page
Aguirre-Cervantes v. I.N.S. 242 F.3d 1169 (9th Cir. 2001)	5
Al-Harbi v. I.N.S. 242 F.3d 882 (9th Cir. 2001)	5
Allied Chemical Corp. v. Daiflon, Inc. 449 U.S. 33 (1980)	4
Fisher v. I.N.S. 37 F.3d 1371 (9th Cir. 1994)	5
Gailius v. I.N.S. 147 F.3d 34 (9th Cir. 2001)	7
Gonzalez v. I.N.S. 82 F.3d 1092 (9th Cir. 1996)	15
Gormley v. Ashcroft 364 F.3d 1172 (9th Cir. 2004)	5
I.N.S. v. Cardoza Fonseca 480 U.S. 421 (1987)	10, 13, 14, 15
INS v. Ventura 537 U.S. 12 (2002)	2, 6-7, 7, 8, 9
Jahed v. I.N.S. 356 F.3d 991 (9th Cir. 2004)	11, 15
Larita-Martinez v. I.N.S. 220 F.3d 1092 (9th Cir. 2000)	15
Lim v. I.N.S. 224 F.3d 929 (9th Cir. 2000)	16
Lolong v. Gonzales 400 F.3d 1215 (9th Cir. 2005)	13

Cases—Continued	Page
Mallard v. U.S. Dist. Court for Southern Dist. of Iowa 490 U.S. 296 (1989)	4, 10
Malty v. Ashcroft 381 F.3d 942 (9th Cir. 2004)	13
Mamouzian v. Ashcroft 390 F.3d 1129 (9th Cir. 2004)	13
Maravilla Maravilla v. Ashcroft 381 F.3d 855 (9th Cir. 2004)	7
Martirosyan v. I.N.S. 229 F.3d 903 (9th Cir. 2000)	14
Mejia v. Ashcroft 298 F.3d 873 (9th Cir. 2002)	6, 8, 10
Mendez-Gutierrez v. Ashcroft 340 F.3d 865 (9th Cir. 2003)	6
Mohammed v. Gonzales 400 F.3d 1177 (9th Cir. 2005)	10
Montecino v. I.N.S. 915 F.2d 518 (9th Cir. 1990)	14
Njuguna v. Ashcroft 374 kF.3d 765 (9th Cir. 2004)	14
Recinos de Leon v. Gonzales 400 F.3d 1185 (9th Cir. 2005)	13
Roche v. Evaporated Milk Ass'n. 319 U.S. 21 (1943)	4
Rogers v. Alabama 192 U.S. 226 (1903)	17

Cases—Continued	**Page**
Thomas v. Ashcroft 409 F.3d 1177 (9th Cir. 1998) (en banc)	2, 9
Sullivan v. Hudson 490 U.S. 877 (1989)	8
Velarde v. I.N.S. 140 F.3d 1305	8
Ventura v. I.N.S. 264 F.3d 1150 (9th Cir. 2001)	7
Vera-Valera v. I.N.S. 123 F.3d 1302 (9th Cir. 1997)	6
Vera-Valera v. I.N.S. 147 F.3d 1036 (9th Cir. 1998) (en banc)	6
Constitution:	
Article III, Section 2, Clause 1	1
Statutes:	
28 U.S.C. § 1651(a)	1

TABLE OF APPENDICES

	Page
Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit Narinder Singh; et al. v. Gonzales (filed May 23, 2005)	1a
Order Amending Memorandum Disposition (filed June 14, 2005)	3a
Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit Narinder Singh; Kulwant Kaur; Sandeep Singh; Navneet Singh v. Immigration and Naturalization Service (filed December 20, 2002)	5a
Decision of the Board of Immigration Appeals (dated October 8, 2003)	8a
Order Denying Petition for Rehearing with Suggestion for Rehearing En Banc (filed August 18, 2005)	11a
Excerpts of Brief in Support of Remand from Ninth Circuit Court of Appeals (Received July 18, 2003)	12a
Order Granting Motion to Recall the Mandate (filed September 8, 2005)	23a

OPINIONS BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit, filed on May 23, 2005, appears in the Appendix. ("Pet. App.") 1a-2a. The unpublished order amending the memorandum disposition, filed on June 14, 2005, appears at Pet. App. 3a-4a.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2005, and amended on June 14, 2005. A petition for panel rehearing with suggestion for rehearing en banc was denied on August 18, 2005. Pet. App. 11a. This Court's jurisdiction is based on 28 U.S.C. § 1651(a).

CONSTITUTIONAL PROVISION INVOLVED

The Ninth Circuit's jurisdiction, or lack thereof, is implicated under the United States Constitution, Article III, Section 2, Clause 1, which provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime jurisdiction;—to Controversies to which the United states shall be a Party;—to Controversies between two or more States;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Narinder Singh, Kulwant Kaur, and their two minor children, Sandeep Singh and Navneet Singh, citizens of India, petition this Court for a writ of mandamus to compel the three-judge panel of the Ninth Circuit, that rubber-stamp-

ed the denial of their petition for review, to follow the law as mandated by this Court in *INS v. Ventura* and the Ninth Circuit in *Thomas v. Ashcroft*.

1. On November 2, 1995, the Immigration and Naturalization Service ("INS" or "Service")[1] began deportation proceedings with the issuance of Orders to Show Cause ("OSC") alleging that the petitioners were deportable pursuant to Section 41(a)(1)(B) of the Immigration and Nationality Act ("INA"). At a deportation hearing before the Immigration Court in San Francisco, California, on June 12, 1996, the petitioners conceded the allegations set forth in the OSC and requested relief by way of applications for asylum and withholding of deportation. In the alternative, petitioners requested voluntary departure under INA § 244(e). At a hearing on January 15, 1997, and continued on July 29, 1997, the Immigration Judge denied petitioners' applications for asylum and withholding of deportation, however, granted voluntary departure by January 29, 1998.

2. The Singhs filed a timely appeal to the Board of Immigration Appeals. The BIA dismissed the appeal on September 5, 2001. On October 5, 2001, the Singhs filed a timely appeal to the Ninth Circuit Court of Appeals. On October 19, 2001, the Singhs filed a motion for stay of deportation, which was granted on January 18, 2002.

On December 20, 2002, the Ninth Circuit Court of Appeals issued its Memorandum Decision. Pet. App. 5a-7a. The Court remanded the case "to allow the BIA to address whether Singh's testimony regarding his brother is sufficient, along with other evidence, to establish that petitioners are eligible for asylum or withholding of deportation based on claimed persecution by the police." The Ninth Circuit observed that "the BIA misconstrued Singh's testimony and the factual basis for his petition" with regard to police

---

[1] The Immigration and Naturalization Service is now the U.S. Citizenship and Immigration Services ("USCIS").

persecution. The Court also held that substantial evidence supports the BIA's decision that the militants did not persecute Singh on account of religion.

3. On remand to the BIA, Mr. Singh raised two legal theories based on the undisputed facts in his case to support his claims for asylum and withholding of deportation: (1) a well-founded fear of *future* persecution on account of an imputed political opinion because of the close relationship to his brother, who was tortured and killed by the Punjab police because they believed he was a Sikh militant or supporter of the Sikh militants; and (2) a well-founded fear of *future* persecution on account of his membership in a particular social group, the Narinder/Harginder Singh social group. Pet. App. 15a-22a. On October 8, 2003, the BIA again dismissed the Singhs' applications for asylum and withholding of deportation. Pet. App. 8a-10a.

4. On November 5, 2003, the Singhs filed a timely petition for review with the Ninth Circuit from the BIA's final order of dismissal. On November 7, 2003, the Singhs filed a motion for stay of deportation, which was granted on March 25, 2004. On May 23, 2005, the Ninth Circuit denied Mr. Singh's petition. Pet. App. 1a-2a. On June 6, 2005, Mr. Singh filed a motion to rescind the Ninth Circuit's denial of the petition based on the Ninth Circuit's June 3, 2005 *en banc* decision in *Thomas v. Ashcroft* (holding that a family can be a particular social group). On June 14, 2005, the Ninth Circuit amended its May 23, 2005 memorandum disposition stating that Mr. Singh's "fear of future persecution is not objectively reasonable whether the alleged reason for his fear is an imputed political opinion or, instead, is his family relationship to his brother." (citing *Thomas v. Ashcroft*). Pet. App. 3a-4a. A petition for panel rehearing with suggestion for rehearing en banc was denied on August 18, 2005. Pet. App. 11a. A motion to recall the mandate was granted on September 8, 2005. Pet. App. 23a.

REASONS FOR ALLOWANCE OF THE WRIT

A. MANDAMUS LAW

The traditional use of the writ of mandamus in federal courts "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 308 (1989). "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980).

The Court has recognized that in order to insure that the writ will issue only in extraordinary circumstances the Court has required that the petitioner seeking the writ have no other adequate means to attain the relief he desires; and that he carry the burden of showing that his right to the writ is clear and indisputable. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). In the present case, Mr. Singh has no other *adequate* means to attain the relief he desires, unless the Court believes that filing a petition for writ of certiorari is adequate, in which case, Mr. Singh asks the Court to consider the petition for writ of mandamus as a petition for writ of certiorari. Therefore, "adequate relief cannot be obtained in any other form or from any other court." Supreme Court Rule 20.1.

In addition, to justify the granting of a writ of mandamus, "the petition must show that the writ will be in aid of the Court's appellate jurisdiction." Supreme Court Rule 20.1. However, the Court has recognized that "[i]ts authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 25 (1943).